

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

ORIGINAL

75-4027

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-4027

SID FARBER and NADIA FARBER,
Petitioners-Appellants,
against

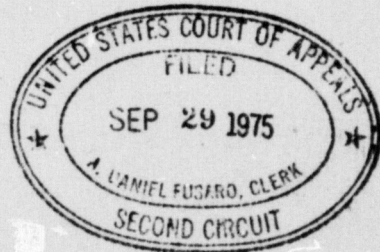
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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BRIEF FOR PETITIONERS-APPELLANTS

The petitioners-appellants ("Petitioners") submit the following statement in reply to the brief for the respondent-appellee ("Respondent").

It remains evident and unquestioned that the respondent utterly failed to produce a single witness whose testimony could be accepted as "expert" with regard to the authenticity or value of the painting gifted by the petitioners herein.

Mrs. Posner did not even dispute the authorship of the painting as by Tintoretto. She conceded that she was merely an art historian of some ten years; that she had never authenticated any painting at any time; that she agreed to testify for the respondent without having first viewed the painting in question; and that she only examined the painting on the morning of trial and then for a fleeting forty minutes.

Certainly on a question so serious as the value of this painting, her testimony should have been disregarded in all respects, though in any case, she did not deny the authenticity of the painting.

Mr. Bert Norton was the only other witness called by the respondent. Upon cross-examination, he admitted that he has no training and pretends no expertise in 16th Century Venetian art. Rather he holds himself out as a dealer in Dutch and Flemish paintings. Importantly, Mr. Norton had never authenticated any painting and was either grossly inaccurate or untruthful as noted by the trial court itself in testifying on market value. All that Mr. Norton offered was the statement that the painting in question, which was over 400 years old, was the subject of restoration.

On the present appeal, the respondent seeks to make much of the question of restoration. The importance of restoration however was comprehensively covered in the testimony of John LaMarre, who is concededly an expert on Tintoretto. As Mr. LaMarre stated, the restoration of the painting in question was relatively modest, and in fact, of a quantity found on all Tintoretto's.

The respondent has no answer for this Court as to why the trial court was not bound by the compelling evidence represented by the testimony of

Professor Mariacher and the expertises by renowned experts on Tintoretto admitted into evidence on the stipulation of the respondent. To label them as "hearsay" hardly affects their impact since there was manifestly no reason for these experts to jeopardize their reputations in the art community by falsifying the authenticity of the painting in question. Indeed, their genuine authentications were given at a time well before the valuation issue arose herein, and thus, no reason for their falsification can possibly be advanced.

It is telling to note that the respondent in no way questions the expertise of Mr. LaMarre and Mrs. Bartholet.

In summary then, the respondent has failed to produce a single witness who qualifies as expert on the question at issue. There is not a scrap of evidence in this record which casts real doubt on the abundance of credible testimony supporting the petitioners' claim for deduction.

As its parting shot, the respondent raises for the first time on this appeal the suggestion that the petitioners failed to prove their case since they did

not introduce the price that they paid or the name of the party selling the painting in question to them. This contention is singularly without merit. Surprisingly, it was raised by the trial court after the stipulated issues for trial were reviewed with the court itself. At no time did the respondent request, nor did the court suggest, that such evidence would be required. The reason for this is clear enough: if the petitioner sought to introduce evidence that they paid in excess of the amount claimed for deduction they could anticipate that such evidence would not be admitted. The question for the trial was the value of this painting as an authentic Tintoretto in 1966, and not whether the petitioners obtained the painting at a bargain price or an exorbitant one. This belated argument is of a piece with the respondent's eleventh hour recruiting of its only witnesses and their lack of qualification.

On the record below, it is clear that the court erred in its studied and wrongful refusal to weigh the credible evidence on authenticity and value. There was no foundation in the record for the ruling of the court below.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be reversed.

Respectfully submitted,

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State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON

being duly sworn, deposes

and says that he is over the age of 18 years. That on the 29th
day of September, 1975, he served two copies of the

Reply Brief for Petitioners-Appellants on
Scott P. Crampton, Asst. Attorney General

the attorney for the Appellee

by depositing the same, properly enclosed in a securely sealed
post-paid wrapper, in a Branch Post Office regularly maintained
by the Government of the United States at 90 Church Street, Borough
of Manhattan, City of New York, directed to said attorney at
No. Tax Division, U. S. Dept. of Justice, () ~~XXXX~~,
Washington, D. C. 20530
that being the address designated by him for that purpose upon
the preceding papers in this action.

David F. Wilson

Sworn to before me this

29th day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976